IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 104 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

UTKARSH BUILDERS

Appearance:

1. INCOME TAX REFERENCE No. 104 of 1991
MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 25/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the revenue, the following question of law has been referred to this court for its opinion by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') :

"Whether, in law and on facts, the assessee is entitled to depreciation at the rate of 30% on two items, namely, (1) Hot Mixing Plant and (2) Paver Finishing Machine used by the assessee in its activity of road building?"

2. We have heard Sr. Standing Counsel Shri M.R. Bhatt for the applicant revenue. Nobody has appeared for the respondent assessee, though the respondent assessee has been duly served with the notice of this court.

3. The facts giving rise to this reference, in a nutshell, are as under :

4. For the Assessment Year 1982-83 the assessee had claimed depreciation @ 30% on the following two machineries: (1) Hot Mixing Plant, and (2) Paver Finishing Machine.

5. The assessee is in business of construction of roads and, according to it, both the machines referred to hereinabove were "earth-moving machinery employed in heavy construction works such as dams, tunnels, canals, etc." as incorporated in Appendix-I, at Sr.No. III-D(4), of The Income-tax Rules, 1962 and, therefore, the assessee was entitled to depreciation on the said machines @ 30%.

6. The ITO, however, allowed depreciation @ 15% because, according to him, the said machines were "roadmaking plant and machinery" as incorporated in Appendix I, at Sr. No. III-B(14), of The Income-tax Rules, 1962.

7. Being aggrieved by the order passed by the ITO, the assessee filed an appeal before the CIT (Appeals). The CIT (Appeals), after hearing the concerned parties, upheld the view taken by the ITO.

8. Being aggrieved by the order passed by the

appellate authority, the assessee filed an appeal before the Appellate Tribunal. The Tribunal considered the facts of the case and also considered the decision rendered by the Tribunal in the case of Hindustan Construction Co. v. ITO (30 ITD 171) and came to the conclusion that the machines referred to hereinabove were 'earth-moving machinery employed in heavy construction works such as dams, tunnels, canals, etc' and, therefore, the assessee was entitled to depreciation @ 30% on the said machinery.

9. In the aforesaid circumstances, this court has to decide the question referred to hereinabove and to opine whether the assessee was entitled to depreciation @ 30% or 15%.

10. Learned Counsel Shri M.R. Bhatt has submitted that the Tribunal was in error while considering and following its order passed in Hindustan Construction Co. (supra). He has drawn our attention to the said order and also to a circular, which has been referred to in para 13 of the said order.

11. It has been submitted by the learned advocate that the Tribunal allowed depreciation @ 30% by considering the aforestated two machineries as 'earth-moving machines' though, in fact, the said machineries cannot be considered to be earth-moving machineries.

12. It has been submitted by him that in the case of Hindustan Construction Co. (supra), the Tribunal was concerned with "dumpers". It has been submitted by the learned counsel that the function of the dumper is to move earth from one place to another. It has been submitted by him that the name itself suggests that the function of the dumper is to move earth from one place to another or to dump earth at one particular place. It has been, thus, submitted by him that a 'dumper' cannot be said to be 'road-making plant and machinery'. It has been also submitted by him that while taking final decision in the case of Hindustan Construction Co. (supra), the Tribunal had looked into a circular issued by the Ministry of Industry and Company Affairs. The said circular, which has been referred to in Para 13 of the said order, reads as under :

"Broad banding of industries for Earth Moving Machinery - Clarification regarding.

(Issued by Ministry of Industry and Company Affairs,

Department of Industrial Development vide their F. No. 1065/85 LP Press Note No. 28(1985 Series) dated 11-10-1985).

In the Department of Industrial Development's Press Note No. 15 (1985 Series) dated 17th June, 1985 schemes of Broad banding were announced in respect of 14 industries which also included Earth Moving Machinery Industry. The Earth Moving Machinery Industry was divided into the following two sub-categories :-

(a) Earth Moving Machinery including bull dozers, dumpers, scrappers, loaders, shovels and drag lines.

(b) Road rollers and vibratory compactors.

2. On further consideration of the matter, it has now been decided to categorise the Earth Moving Machinery Industry in the following manner :-

(a) Earth Moving Machinery including bull dozers, dumpers, scrappers, loaders, shovels, vibratory compactors and drag lines (excluding walking drag lines)

(b) Walking drag lines

(c) Road rollers, hot-mix plants and other road-construction and bridge-construction machinery".

3. The entrepreneurs are requested to note the above mentioned changes."

13. According to the Sr. Standing Counsel, the aforestated circular has not been issued either by the CBDT or by any authority concerned with the Act or by the Finance Department. The said circular is not pertaining to determination of the rate of depreciation which the revenue should grant in the matter of dumper or any other plant or machinery. Upon perusal of the circular reproduced hereinabove, it is clear that the said circular is in the nature of an announcement in respect of 14 industries, which also includes earth moving machinery industry. By virtue of the said circular, dumper is included in the category of earth moving machinery.

14. As we are not concerned with the dumper, in our opinion, a reference to the said circular by the Tribunal

was not at all warranted and, therefore, we would not like to give any importance to the said circular, especially when the said circular is not concerned with determination of the rate of depreciation under the provisions of the Act.

15. For the purpose of determining whether the machineries referred to hereinabove were used for the purpose of road making or for the purpose of earth moving, one has to look at the purpose for which the said machineries are being normally used.

16. As the name denotes, 'Hot Mixing Plant' is a plant, which is used for the purpose of making mixture of concrete. Though concrete is often used for the purpose of construction of road, the concrete mixing machine is never used for the purpose of moving earth from one place to another and, therefore, in our opinion 'Hot Mixing Plant' can never be considered an 'earth moving machinery employed in heavy construction works such as dams, tunnels, canals, etc.' (emphasis supplied)

17. So far as 'Paver Finishing Machine' is concerned, the said machine is used for the purpose of giving adequate pressure on the surface of the road to be constructed so that the road can withstand the pressure of vehicular traffic. Looking to the said fact, it cannot be said that "Paver Finishing Machine" is an earth moving machinery. We, therefore, come to a conclusion that paver finishing machine is a "road making plant and machinery."

18. Looking to the aforesaid facts, it is clear that the machineries in question are being used for the purpose of construction of road and, therefore, by no stretch of imagination it can be said that the said machineries were being used for the purpose of moving earth from one place to another. Thus, 'Hot Mixing Plant' and 'Paver Finishing Machine' are not earth moving machineries. Function of an earth moving machinery is to move or shift earth from one place to another. The machines with which we are concerned are not machines which were being used by the assessee for the purpose of moving earth from one place to another, but they were used only in the process of road making and, therefore, the ITO as well as the first appellate authority had rightly come to the conclusion that both the machines were 'road making machinery' falling under clause III-B(14) of Appendix I of Income-tax Rules, 1962 and, therefore, the assessee should have been granted depreciation @ 15%.

19. Looking to the above-referred position, in our opinion, the Tribunal was not right when it allowed the appeal and directed the ITO to grant depreciation @ 30% in respect of the said machineries.

20. For the reasons stated hereinabove, we answer the question in the negative, i.e., in favour of the revenue and against the assessee.

The reference stands disposed of accordingly with no order as to costs.

(A.R. Dave, J.)

(A.M.Kapadia, J.)

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